

A MELEWAR APEX SDN BHD

v.

MALAYAN BANKING BHD

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: D4-22-479-2001]
4 OCTOBER 2006

C ***BANKING: Banker and customer - Forged cheques - Signatures on***
cheques not that of authorised signatory - Whether plaintiff only required
to prove upon balance of probabilities signatures on cheques forged -
Whether burden upon bank to prove drawer knowingly or negligently
contributed to the forgery or the making of unauthorized signature - Bills
D *of Exchange Act 1949, s. 73A*

E By this action, the plaintiff claimed for, *inter alia*, a declaration that
the defendant had wrongfully debited the plaintiff's account with
the total amount of RM540,500. The plaintiff had opened a
current account with the defendant since 1994 and at all material
times the sole and only authorized signatory to the said account
was one Tunku Soraya Dakhlah Tunku Abdullah, who had
provided a specimen signature to the defendant upon the opening
of the account. The plaintiff pleaded that from 14 July 1998 until
F August 2000, the defendant had paid out 69 cheques, purporting
to be drawn by the plaintiff and made payable to the drawee and
debited the plaintiff's account with the amounts thereof. The
plaintiff pleaded that the signatures on the said cheques were not
that of the authorized signatory as provided to the defendant and
G that the signatures on those cheques were forged ('forged
cheques') by one Affandi Mamat, who was at the material time in
charge of keeping and maintaining the plaintiff's accounts. The
plaintiff further pleaded that the plaintiff did not draw or authorise
the drawing of the forged cheques and the defendant had
H therefore wrongfully and without the plaintiff's authority paid on
the forged cheques and debited the plaintiff's account with the
amounts thereof. The defendant disputed as a question of fact
that the signatures on the cheques were forged and alternatively
I asserted that they were issued by the plaintiff's agent and servant
on fraudulent misrepresentation to the defendant and not from the
defendant's wrongdoing.

Held (allowing the plaintiff's claim):

- (1) No application was made in court to order Tunku Soraya to provide specimen signatures before the court that could be used for comparison, neither was she challenged that the specimen signatures were not her signatures. The court not only accepted the testimony of Tunku Soraya that the signatures on the cheques were not her signature and that the specimen signatures provided to one Lim Yok Chaw (PW1) were what they purported to be since there was no evidence to the contrary *ie* that they were the signature specimens of Tunku Soraya, but also therefore the evidence of PW1 that the signature on the cheques were not made by the person who signed the specimen signatures. (para 26)
- (2) It was not necessary for the plaintiff, and it was not central to the liability that there must be proof that it was the Finance Manager who signed or forged the cheques. The plaintiff was only required to prove upon a balance of probabilities that the signatures on the cheques were not the signature of Tunku Soraya. (para 27)
- (3) A close perusal of s. 73A of the Bills of Exchange Act 1949 shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. There was no evidence adduced that the plaintiff knew the Finance Manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the Finance Manager was not addressed, and that these were the factors that contributed to the forgery or the making of the unauthorized signature by the Finance Manager. (paras 33, 35, 36 & 37)
- (4) The bank failed to bear in mind that the cheque account of a customer is a facility for the customer to use, and the statement of account is an account of the sum of money owed by the bank to its customer. It is a credit-debt account and the customer has no rights *in rem* to any currency notes or coin in the bank. The money in the bank belongs to the bank and it is for the bank to decide whether to release its own money upon the purported exercise of authority by a customer who is granted a cheque issuing facility. Whether it

- A could successfully debit the customer's account subsequently is a separate matter. Thus when a bank pays out on a cheque drawn on a customer's account, it takes the risk of not being able to recover from the customer unless it can show the customer had knowingly or negligently contributed to the
- B forgery or the making of the unauthorised signature. This, the banks have failed to do. (para 38)

Case(s) referred to:

- Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1986] 1 AC 80 PC (*refd*)
- C *UAB Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 SC (*refd*)

Legislation referred to:

- Bills of Exchange Act 1949, s. 73A
- D Evidence Act 1950, ss. 67, 73

Other source(s) referred to:

- Lee Mei Pheng, *Banking and Negotiable Instruments Handbook*, 2004 edn, p 21
- Poh Chu Chai, *Law and Banking Vol 1: Banker and Customer*, 3rd edn
- E 1995, p 545

For the plaintiff - PL Leong & Mark Lau; M/s Sivananthan

For the defendants - CL Lim; M/s Azam Lim & Pang

Reported by Suhainah Wahiduddin

F

JUDGMENT

Abdul Wahab Patail J:

- G [1] By this action the plaintiff claimed for the following:
- (a) A declaration that the defendant had wrongfully debited the plaintiff's account with the total amount of RM540,500;
- H (b) The sum of RM540,500;
- (c) Interest;
- (d) Costs; and
- I (e) Such further and other relief as this court deems fit.

- [2] On or about 2 August 1994, the plaintiff applied to open a current account with the defendant at its branch at Kompleks Pernas Sogo, 190 Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur. The application was approved and an account was therefore opened on 6 September 1994, bearing the number 5-14347-50214-7 ("the account"). A B
- [3] At all material times, the sole and only authorised signatory to the account was one Tunku Soraya Dakhlah binti Tunku Abdullah, who provided a specimen signature to the defendant upon the opening of the account. C
- [4] The plaintiff pleaded that from on or around 14 July 1998 until August 2000, the defendant paid out on 69 cheques, purporting to be drawn by the plaintiff and made payable to the drawee, and debited the plaintiff's account with the amounts thereof. D
- [5] This above is disputed by the defendant in the analysis of pleadings as a question of fact that on or around 14 July 1998 to August 2000, the defendant paid on the cheques listed in para. 8 of the statement of claim or para. 7 below. E
- [6] The plaintiff pleaded that however, the signatures on the said cheques were not that of the authorised signatory as provided to the defendant. The signatures on those cheques were forged ("the forged cheques") by one Affandi bin Mamat, who was at the material time in charge of keeping and maintaining the plaintiff's accounts. F
- [7] This above is disputed by the defendant as a question of fact that the signatures on the cheques were forged. Alternatively, the defendant asserted they were issued by the plaintiff's agent and servant on fraudulent misrepresentation to the defendant and not from the defendant's wrong doing. The plaintiff is vicariously liable and/or contributed to its losses. G
- [8] The plaintiff pleaded that upon discovery by the plaintiff of the forged cheques, the plaintiff immediately informed the defendant of the same by a telephone conversation on 7 September 2000 and its letter dated 7 September 2000. H
- [9] This above is disputed by the defendant as a question of fact that the plaintiff had immediately informed the defendant when it discovered the forged cheques. I

A [10] Particulars of the allegedly forged cheques were provided. This is disputed by the defendant as a question of fact that the cheques were forged.

B [11] The plaintiff pleaded that the plaintiff did not draw or authorise the drawing of the forged cheques, and the defendant had therefore wrongfully and without the plaintiff's authority paid on the forged cheques and debited the plaintiff's account with the amounts thereof.

C [12] This above is disputed by the defendant as a question of fact on similar grounds.

D [13] There is a second suit D4-22-478-2001 for 4 other cheques for the sum of RM20,020 where the defendant is Phileo Allied Bank (Malaysia) Berhad. The issues are the same.

[14] The defendant banks, Malayan Banking Berhad and Phileo Allied (Malaysia) Berhad are collectively referred to as the banks.

The Law

E [15] The case law relied upon are as follows.

F [16] In *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1986] 1 AC 80 PC, the Privy Council rejected the argument that the customer of the bank had any duty to check the bank statements for irregularities and to inform the bank. It was held that the customer's duty is two fold:

- (a) He must exercise due care in drawing his cheques so as not to facilitate fraud or forgery; and
- G (b) He must inform his bank at one of any unauthorised transactions or cheques which he becomes aware of.

H [17] The forgery went undetected for a long time as the employee in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors.*, was, like the employee in this case, a trusted employee.

I [18] The above case was followed by the Supreme Court in *UAB Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31, which also held that the plaintiff must prove upon a balance of probabilities that the cheques were forged. The explanation was given that a forged instrument is a nullity and a banker can derive

no authority, actual or implied, from its customer, to act upon it. Any payment made upon such instrument is the liability of the bank only. A

Paying Out On The Cheques

[19] The basis of the plaintiff's case is that the banks paid out on forged cheques upon presentation. B

[20] In both cases the sole signatory of the cheque account is Tunku Soraya. Tunku Soraya testified she did not sign the cheques. This is supported by the testimony of Lim Yok Chaw (PW1) who had concluded that the cheques were probably by different authorship. C

[21] Notwithstanding that the defendant in the pleadings had disputed as a question of fact that the defendants had, on or around 14 July 1998 to August 2000, paid out on the cheques, the matter was not pursued in the trial. The court concludes that the defendants conceded they had paid out on the cheques. D

Whether The Cheques Were Forged

[22] The remaining issue is whether the cheques were in fact forged. E

[23] The defendants submitted that while it is accepted that the cheques were examined by PW1, and that the signatures thereon differed from the specimen signature provided to him, there was no evidence who signed the specimen signatures. F

[24] In each of the 2 reports prepared by PW1, the specimen signatures were the same set in an envelope marked "A", being: G

- a) signatures above the words "Executive Director" in Melewar Apex Sdn Bhd letters dated 23 January 1998, 26 June 1998, and 29 September 1998 respectively,
- b) specimen signature beside "EXECUTIVE DIRECTOR" and below "MELEWAR APEX SDN BHD" on the specimen signature card of Account No. 687-0-581904 dated 19 December 1997, and H
- c) signatures on 3 pieces of paper. The reports were to the effect that the signatures on the cheques submitted differed from the signatures in envelope marked "A" as to handwriting characteristics. I

- A [25] It is provided by s. 73 of the Evidence Act 1950 that:
- (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.
- B
- C (2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person. ...
- D [26] Although Tunku Soraya was in court and was cross-examined, no application was made by the defendants to the court for an order that Tunku Soraya write words, figures or her signature to enable the court to compare with the signatures on the cheques or of the specimen signatures provided to PW1. The
- E objection, therefore, that it was not proved who made the specimen signatures provided to PW1 cannot be upheld since Tunku Soraya was not challenged that the specimen signatures were not her signatures and no application was made in court to order Tunku Soraya to provide specimen signatures before the
- F court that could then be used for comparison. In the event, the court not only accepts the testimony of Tunku Soraya that: (a) the signatures on the cheques were not her signature, (b) the specimen signatures provided to PW1 were what they purported to be since there is no evidence to the contrary, ie, that they
- G were the signature specimens of Tunku Soraya, but also therefore the evidence of PW1 that the signature on the cheques were not made by the person who signed the specimen signatures.
- [27] Reliance upon s. 67 of the Evidence Act 1950 that "If a
- H document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting" is erroneous for it is not necessary for the plaintiff, and it is not central to the
- I liability that there must be proof that it was the Finance Manager who signed or forged the cheques. The plaintiff is only required to prove upon a balance of probabilities that the signatures on the cheques were not the signature of Tunku Soraya.

Bills Of Exchange Act 1949

A

[28] The banks rely upon the fact that notwithstanding that Tunku Soraya is the sole signatory, the cheque book was left with the Finance Manager, and if the allegation is true, Tunku Soraya did not check the accounts for 26 months. The banks also relied upon s. 73A of the Bills of Exchange Act 1949 which provides, with effect from 1 July 1998 that:

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Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

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[29] In other words, the Act gives protection against paying out on cheques which contained forged signatures. It was provided that the bank may treat such cheques as properly signed if it is proven that the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature.

E

[30] It was submitted that the circumstances of the case warrant the operation of s. 73A in order to protect the paying bank for the following reasons:

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- (a) The plaintiff had knowingly allowed the perpetrator full access to the plaintiff's account.
- (b) The plaintiff negligently did not check its monthly bank statements for the entire 26 months. The plaintiff's PW2 confirms having received the statements from both the branches under cross-examination. She says she did not read them. That is negligence.
- (c) Even if the cheques were forged which is denied, the perpetrator, allegedly the Finance Manager, who at the material times the plaintiff's agent and servant, was allowed opportunity to forge the signature so well that the expert PW1 testified in cross-examination that he could not tell the difference between those in the disputed cheques and those in the "A" documents. The banks had only paid on those cheques out of good faith.

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- A [31] The plaintiff is a company. It acts through its agents and servants. It is expected that the Finance Manager of the company would keep the cheque books and accounts of the company. Nothing in s. 73A of the Bills of Exchange Act 1949 would cause any change in the decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* with regard to reliance upon a trusted employee to keep the cheque book, and to prepare cheques if any are to be drawn from the cheque account.

- C [32] The defendants referred to p. 545 of *Law and Banking Vol 1: Banker and Customer* (3rd edn 1995) by Poh Chu Chai where the learned author wrote:

In cases where an employee was authorised to prepare cheques for the signature of an employer, then the employer was under a duty to keep a close supervision over his employee.

- D [33] With respect, it does not follow that because an employee is authorised to prepare the cheques for signature of the employer, the employer must keep, over and above the general supervision over employees, a close supervision over that employee. The statement by the learned author did not appear to have addressed this point which is apparent in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors*. It might be a different matter if that employee were authorised to sign the cheques for the employer.

- F [34] In *Banking and Negotiable Instruments Handbook* by Lee Mei Pheng 2004 Edition at p. 21, the learned author correctly wrote:

- G With effect from 1 July 1998, section 73A of the Bills of Exchange Act 1949 gives protection against paying on cheques which contain forged or unauthorised drawers' signatures. The bank may treat such cheques as being properly signed or authorised if it is proven that the drawer had 'knowingly or negligently' contributed to the forgery or the making of the unauthorised signature.

- H [35] A close perusal of s. 73A shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature.

- I [36] It is clear that s. 73A was not a complete but was a qualified reversal of the previous law, placing the burden upon the bank to prove that the drawer:

(a) had acted knowingly or negligently; and A

(b) thereby contributed

(i) to the forgery or

(ii) the making of the unauthorised signature. B

[37] There is no evidence adduced that the plaintiff knew the Finance Manager was unreliable or had a bad record, or that the recruitment was so negligently conducted that the reliability of the Finance Manager was not addressed, and that these were the factors that contributed to the forgery or the making of the unauthorised signature by the Finance Manager. C

[38] The cheques were invariably drawn as cash cheques, in some cases within a matter of days of the earlier. Yet it is not even suggested that the bank had at any time inquired why there were only cash cheques. The bank clearly failed to bear in mind that the cheque account of a customer is a facility for the customer to use, and the statement of account is an account of the sum of money owed by the bank to its customer. It is a credit-debit account, and the customer has no rights *in rem* to any currency notes or coin in the bank. In plainer terms, the money in the bank belongs to the bank, and it is the bank that decides whether to release its own money upon the purported exercise of authority by a customer who is granted a cheque issuing facility. Whether it could successfully debit the customer's account subsequently is a separate matter. Thus when a bank pays out on a cheque drawn on a customer's account, it takes the risk of not being able to recover from the customer unless it can show the customer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. This the banks have failed to do. D
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[39] In the circumstances, the claim by the plaintiff in each case was allowed with costs. H

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